Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-824

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

---

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, AND MICHAEL K. MCCABE,

*Petitioners,*

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

---

## REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

---

RICHARD E. GARDINER *
JANET K. SCHERER
1600 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

12

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| FACTS | 1 |
| I. THE PETITION FOR A WRIT OF CERTIORARI WAS TIMELY FILED | 2 |
| II. THE LOWER COURTS LACKED SUBJECT MATTER JURISDICTION | 4 |
| III. A CONFLICT EXISTS BETWEEN CIRCUITS | 5 |
| CONCLUSION | 9 |

## TABLE OF AUTHORITIES


*CASES:* Page

*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 5
*Buckley v. Valeo*, 519 F.2d 817 (D.C. Cir. 1975) .... 6, 7
*F.T.C. v. Minneapolis-Honeywell*, 344 U.S. 206 (1952) ..... 3
*Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694 (1982) ..... 4, 5
*Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884) ..... 4
*Rubber Company v. Goodyear*, 6 Wall. 153 (1868) .. 2

*STATUTES:*

2 U.S.C. 437a, repealed, Pub.L. 94-283, Title I, § 105, 90 Stat. 481 ..... 5, 6, 7, 8
Minn. Stat. 10A.01 (15) ..... 5
Minn. Stat. 10A.01 (16) ..... 5, 7, 8
Minn. Stat. 10A.12 ..... 8

*OTHER AUTHORITY:*

Supreme Court Rule 20.4 ..... 2, 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 85-824

---

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, AND MICHAEL K. MCCABE,

*Petitioners,*

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

---

## REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

---

### FACTS

In its Opposition to NRA's petition, Respondent accuses the NRA of having "trivialized" (Opposition, at 3) its electioneering activities in Minnesota and, in what Respondent seemingly views as an attempt to balance the picture, discusses facts concerning the activities of the National Rifle Association Political Victory Fund which

were not before the Court of Appeals and are not at issue in this case. See, Opposition, at 5-6. Such an effort by Respondent is clearly an attempt on Respondent's part to emotionalize and unnecessarily politicize this case.

## I. THE PETITION FOR A WRIT OF CERTIORARI WAS TIMELY FILED

Supreme Court Rule 20.4 states in part, "if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari . . . runs from the date of the denial of rehearing . . ." In this case, the Eighth Circuit, *sua sponte*, issued what it characterized as an "amended order" on August 16, 1985, since its order of August 9, 1985 failed to indicate that three judges dissented from the order denying rehearing. It is thus plain that the Court of Appeals viewed the additional information included in the August 16, 1985 order as significant.

As this Court held *Rubber Company v. Goodyear*, 6 Wall. 153 (1868) (subsequent order of lower court incorporating language of prior order was order from which time for appeal should be calculated), "we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings." 6 Wall. at 155-6. It is thus not for Respondent unilaterally to characterize the Court of Appeals' action as one of "no import" (Opposition, at 14) and, therefore, as an action which did not extend the period for filing this petition. Notably, in *Rubber Company*, this Court found that the date from which the appeal was to be taken was the date of the subsequent order, notwithstanding that the subsequent order—unlike the "amended order" in the instant case which made no reference to the earlier order—expressly stated that it was entered " 'as of' " (6 Wall. at 156) the earlier date.

In the case primarily relied upon by Respondent to support its contention that August 9, 1985, not August

16, 1985, was the date from which the time to file a petition began to run, this Court did not disturb the holding in *Rubber Company*. Indeed, as is clear from the facts in *F.T.C. v. Minneapolis-Honeywell*, 344 U.S. 206 (1952), this Court affirmed the principle of *Rubber Company*—that the intent of the lower court should govern—when it concluded that the F.T.C.'s petition for a writ of certiorari should be dismissed. As this Court recognized, the Court of Appeals in *Minneapolis-Honeywell* knew, when it issued its subsequent decision of September 18, 1951, that "there was no contest over" (344 U.S. at 210) Parts I and II of the F.T.C.'s order and that the F.T.C. had not petitioned the Court of Appeals for a rehearing of its decision of July 5, 1951 reviewing only Part III of the F.T.C.'s order. Thus, the Court of Appeals certainly did not intend, with regard to Part I and II of the F.T.C.'s order, its September 18, 1951 order to revise its earlier decision. Indeed, given that the Court of Appeals' July 5, 1951 decision took no action as to Parts I and II of the F.T.C.'s order, there was nothing which the September 18, 1951 order could revise. By contrast, in the instant case, the Court of Appeals, *sua sponte*, having undoubtedly seen that its August 9, 1985 order was inaccurate and incomplete and might possibly affect this Court's decision to review the Court of Appeals' opinion relating to fundamental constitutional guarantees, promptly superseded its August 9, 1985 order.[1]

In determining whether the time for filing the petition in this case commenced running as of the Court of Appeals' order of August 9, 1985 or its amended order of August 16, 1985, this Court should take into account the fact that, unlike the cases relied upon by Respondent—which involved only questions of statutory construction—core First Amendment rights are at stake in the instant

---

[1] That the Court of Appeals had the power to supersede its earlier order was made clear by this Court in *Minneapolis-Honeywell*. See, 344 U.S. at 211.

case;[2] thus, given that NRA's filing of its petition ninety (90) days after the Court of Appeals' amended order was, at worst, a good faith error by which Respondent was in no way prejudiced nor by which this Court was inconvenienced, this Court should not too narrowly construe Rule 20.4 and should conclude that NRA's petition was timely filed.

## II. THE LOWER COURTS LACKED SUBJECT MATTER JURISDICTION

Respondent portrays NRA's assertion that the lower courts lacked subject matter jurisdiction as asking this Court to correct a "technical error." Opposition, at 17. Subject matter jurisdiction is not, however, merely a "technical" matter; rather, "[t]he validity of an order of a federal court depends upon the court's having jurisdiction over both the subject matter and the parties." *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701 (1982). Indeed, "[s]ubject-matter jurisdiction . . . is an Art. III as well as a statutory requirement." 456 U.S. at 702. Consequently, this Court has emphatically held that the rule requiring federal courts to deny their jurisdiction where subject matter jurisdiction does not exist "is inflexible and without exception . . . [It] requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Notably, Respondent *does not dispute* that subject-matter jurisdiction is lacking in this case. Rather, the

---

[2] It should also be noted that NRA contends—a contention which Respondent does not dispute—that the lower courts lacked subject matter jurisdiction over the case; consequently, at the very least, this Court should grant a writ of certiorari to vacate the lower court's decision.

MEPB contends only that NRA should not be allowed to complain about the absence of subject-matter jurisdiction as it was NRA which originally moved the case to federal court. This contention is wholly insufficient, however, since, as this Court stated in *Insurance Corp.*, "[*no*] *action of the parties* can confer subject matter jurisdiction upon a federal court." (emphasis added) 456 U.S. at 702. Moreover, NRA is not estopped from challenging subject-matter jurisdiction even though NRA was responsible for removing the case to the federal court. *Ibid.*

## III. A CONFLICT EXISTS BETWEEN CIRCUITS

A) Respondent's discussion (at page 22 of its Opposition) of the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976) is not relevant to the issues before this Court in the instant case. In *Buckley*, this Court upheld disclosure requirements as they pertained to political committees[8] that had contributed directly to a candidate or that had spent money in coordination with a candidate's campaign. Three compelling governmental interests for th disclosure requirement were cited: provision of information as to where a candidate's money comes from and how it is spent; deterrence of corruption; and detection of contribution limitation violations. As the NRA explained in its Petition, these governmental interests are not served by disclosure in the circumstances of this case.

B) Respondent's presentation of the Court of Appeals' discussion of § 437a of the Federal Election Campaign

---

[8] The provision of Minnesota law which is "modeled on the federal act" (Opposition, at 22) is the "political committee" provision of Minnesota law (Minn. Stat. 10A.01 (15)), *not* the "political fund" provision (Minn. Stat. 10A.01 (16)) as suggested by Respondent.

Act[4] in *Buckley v. Valeo*, 519 F.2d 817 (D.C. Cir. 1975) is misleading. While it is true that the Court of Appeals in *Buckley* was concerned with the potential application of § 437a "to 'groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance' *Id.* at 870" (Opposition at page 23), this was *not* the only set of circumstances to which the Court of Appeals found potential application of § 437a to be offensive. A careful reading of the Court of Appeals' decision reveals that the Court of Appeals was also concerned about the impact of § 437a on *partisan* activities involving the exercise of First Amendment rights where no direct contributions were involved. This is made clear by the Court of Appeals' discussion of the potential application of § 437a to *Human Events* and the *ACLU*. *Buckley*, 519 F.2d at 870, 871, 872. Thus, the distinction drawn by the Court of Appeals was not—as urged by Respondent's statement that the Court of Appeals "had no trouble distinguishing such groups from those which constitutionally can be obliged to report and disclose their political activities" (Opposition, at 24)— between organizations engaged in partisan discussion of political issues and organizations engaged in nonpartisan discussion of political issues but rather was between organizations which discussed political issues and those which contributed money to candidates or spent money in coordination with candidates. Indeed, the extensive quotation from the Court of Appeals' *Buckley* decision cited by Respondent (Opposition, at 24-25) makes this plain beyond any doubt.

The conflict between the Eighth Circuit decision in the instant case and the D.C. Circuit's decision in *Buckley*

---

[4] This section of the Federal Election Campaign Act of 1971, as amended, was repealed, Pub. L. 94-283, Title I, § 105, 90 Stat. 481, subsequent to the Court of Appeals' decision in *Buckley*.

is also manifest from the D.C. Circuit's discussion of the legislative history of § 437a. The legislative history of § 437a reveals that there was disagreement among the members of the conference committee concerning the breadth of § 437a. *Buckley*, 519 F.2d at 877, n. 140. Representative Frenzel voiced objection to the lack of an express exemption for membership organizations when communicating with members in § 437a; Senator Cannon and Representative Hays answered this objection by stating that § 437a was intended to be limited to those occasions when such organizations communicated with the general public. In making such statements, they plainly attempted to sustain the constitutionality of § 437a by creating an implicit exemption for those instances when organizations communicated only with their members. *Buckley*, 519 F.2d at 877, n. 140.

The Court of Appeals, however, accepted Representative Frenzel's interpretation of § 437a (*Buckley*, 519 F.2d at 877, n.141), that is, that § 437a could "apply indiscriminately and will bring under the disclosure provisions many groups, including liberal, labor, environmental, business and conservative organizations." *Buckley*, 519 F.2d at 877, n. 140. The Court of Appeals was thus able to conclude that § 437a was unconstitutional.[6]

Moreover, if § 437a could have been sustained by reading it not to apply to membership organizations when communicating with their members, then Minn. Stat. 10A.01(16), which has not been read to include to such an implicit exemption, cannot be saved.

---

[6] The Court of Appeals clearly did not "refuse[] to adopt a narrow construction of the statutory phrase 'purpose of influencing the outcome of an election' to avoid affecting purely issue discussion groups." Opposition, at 26. In fact, the Court of Appeals adopted a reading of § 437a which was "the narrowest interpretation feasible" (519 F.2d at 874), but still held § 437a unconstitutional.

C) Respondent asserts that the Minn. Stat. 10A.01(16) is unlike § 437a as it "specifically requires the expenditure of funds for the specific purpose of influencing an election . . ." Opposition, at 26. This is incorrect. Minn. Stat. 10A.01(16) defines a political fund as "any accumulation of dues . . . which accumulation is collected *or* expended for the purpose of influencing the nomination or election of a candidate . . . (emphasis added). There is no requirement that the funds be expended before the reporting requirements of Minn. Stat. 10A.12 are triggered. Moreover, even if this statement were true, it would be further reason to hold § 10A.01(16) unconstitutionally overbroad as there is no compelling governmental interest to uphold its application to the facts of this case.[6]

Respondent also states that the "Minnesota 'political fund' reporting and disclosure requirements *closely resemble* the federal requirements for political committees which were expressly upheld against constitutional attack. . . ." (emphasis added) Opposition, at 27. While this may be true, it is wholly inapposite to the instant case since no "political committee" is involved in this case; thus, none of the rationales for upholding the disclosure requirements for political committees exist. Moreover, when applied to membership organizations communicating solely to their membership, the rationale for upholding the reporting and disclosure requirements is no longer valid. As outlined in this Court's opinion in *Buckley*, 424 U.S. at 67-68, that applies only when the influence is in the form of direct contributions to candidates and/or their committees.

---

[6] Plainly, since NRA "mounted determined and militant efforts *to defeat* a particular state candidate" (emphasis added) (Opposition, at 28), there was no opportunity for corruption; thus, there is no compelling governmental interest for applying § 10A.01(16) to the NRA's activities in this case.

## CONCLUSION

For the reasons set forth herein and in the Petition, this Court should grant a Writ of Certiorari.

Respectfully submitted,

RICHARD E. GARDINER *
JANET K. SCHERER
1600 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record